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No. 99-921

Supreme Court, U.S.
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In The
Supreme Court of the United States

CATHY HOWARD,

Petitioner,

v.

OAKWOOD HOMES CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Petitioner may properly challenge the North Carolina Court of Appeals' ruling on the basis that it violates certain state constitutional rights and federal statutory rights where she did not cross-assign error to the trial court's failure to find and conclude, as an alternative basis for denying Respondent's motion, that enforcement of the DRP violated those rights?

2. Whether the North Carolina Court of Appeals erred in reversing the order of the trial court denying Respondent's motion to compel dispute resolution and stay judicial proceedings where it found under well-established state contract law that a valid arbitration agreement supported by consideration existed between Petitioner and Respondent?

CORPORATE DISCLOSURE STATEMENT

Respondent has no parent corporation, nor does any publicly held company own ten percent or more of Respondent's stock.

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STATUTORY PROVISIONS AND RULES

Petitioner has provided only a portion of the text of North Carolina General Statutes, Section 22B-10. The complete text of North Carolina General Statutes, Section 22B-10 provides:

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.

N.C.G.S. § 22B-10.

Section 102(c)(1) of the Civil Rights Act of 1991 provides:

(c) Jury Trial

If a complaining party seeks compensatory or punitive damages under this section —

(1) any party may demand a trial by jury; and

42 U.S.C. § 1981a(c).

Rule 10(d) of the North Carolina Rules of Appellate Procedure provides in pertinent part:

(d) Cross-Assignments of Error by Appellee

> Without taking an appeal an appellee may cross-assign as error any action or omission of

the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken....

N.C.R.App.P. 10(d).

STATEMENT OF THE CASE

Respondent is engaged in the manufacture and sale of manufactured homes throughout the United States. Pet., p. A2a. On May 1, 1997, Respondent implemented an internal Dispute Resolution Program ("DRP") which both Respondent and its employees are required to use as the sole means of resolving covered employment disputes, including disputes arising out of an employee's termination. Pet., p. A2a. The DRP includes a provision for binding arbitration in which the arbitrator may grant any remedy or relief that would have been available through the courts. Pet., p. A3a. Under the DRP, all arbitrations are conducted in accordance with the Federal Arbitration Act, 9 U.S.C § 1 *et seq.* ("FAA").

In July 1997, Respondent terminated Petitioner's employment for poor performance. Pet., p. A4a. Subsequently, Petitioner filed a civil action in North Carolina state court, alleging various state law claims arising out of her discharge. Pet., p. A4a. Respondent then moved for an order to stay judicial proceedings and compel Petitioner to submit her claim to dispute resolution pursuant to the DRP. Pet., p. A4a. The trial court denied Respondent's motion. Pet., p. B17a. Its sole conclusion of law in denying the motion was that the agreement to arbitrate failed for lack of consideration. Pet., p. B17a; *see also* Pet., p. A13a.

Respondent appealed the order of the trial court, arguing solely that the trial court erred in concluding that the DRP was not an enforceable agreement due to lack of consideration. Pet., p. A6a. Petitioner did not cross-assign error to the trial court's failure to find any alternative bases for denying Respondent's motion. Pet., p. A13a.

On appeal, the North Carolina Court of Appeals reversed the trial court's order denying Respondent's motion to compel dispute resolution. Pet., p. A14a. In its decision, the Court of Appeals concluded that the record evidence showed Petitioner knew that the terms of the DRP would apply to her

should she continue her employment, and that by doing so, Petitioner mutually assented to the program. Pet., p. A11a. The Court of Appeals further concluded that, because both Petitioner and Respondent were mutually bound by the terms of the DRP, such mutuality provided the consideration necessary to support the agreement. Pet., p. A11a. Petitioner's subsequent petition to the Supreme Court of North Carolina for a Writ of Supersedeas and Motion for Temporary Stay of the judgment of the Court of Appeals was denied on August 19, 1999. Pet., pp. C18a-C19a.

This petition followed.

ARGUMENT

I. PETITIONER'S CLAIMS THAT THE DRP VIOLATES HER FEDERAL STATUTORY RIGHTS AND STATE CONSTITUTIONAL RIGHTS ARE NOT PROPERLY BEFORE THIS COURT BECAUSE SHE FAILED TO RAISE THOSE ISSUES BELOW.

In Part I of her Petition, Petitioner contends for the first time that the DRP's arbitration provision violates both Section 102(c)(1) of the Civil Rights Act of 1991, 42 U.S.C. § 1981a(c)(1), and Article I §§ 18 and 25 of the North Carolina Constitution because the DRP limits her access to the courts and deprives her of the right to a jury trial. This contention must fail because neither of these issues is properly before this Court.

In the proceedings below, the trial court's sole conclusion of law in denying Respondent's motion to compel arbitration pursuant to the DRP was that no agreement to arbitrate existed between the parties because "...there was no valid consideration." Pet., p. B17a. This was the finding that Respondent timely appealed. Pet., p. A5a-A6a. Under North Carolina's Rules of Appellate Procedure, an *appellee* may also cross-assign as error any action or omission of the trial court "which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C.R.App. P. 10(d); *see also Albrecht v. Dorsett*, 131 N.C. App. 502, 504, 508 S.E.2d 319, 321 (1998); *Brown v. Brown*, 112 N.C. App. 614, 618, 436 S.E.2d 404, 407 (1993). Here, however, Petitioner did not exercise this right and cross-assign error to the trial court's failure to find and conclude, as an alternative basis for denying Respondent's motion, that the DRP violated Petitioner's state constitutional rights or federal statutory rights. Pet., p. A13a-A14a. As a result, the North Carolina Court of Appeals

correctly declined to consider Petitioner's argument regarding the constitutionality of the arbitration provision, which was raised for the first time in her brief submitted to that court. Pet., pp. A13a-A14a.

For the same reason, Petitioner may not raise this and other like issues here. As this Court has repeatedly ruled, an appellate court may review only those issues properly raised on appeal. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191, 57 S. Ct. 325 (1937) (a party may not, in the absence of a cross-appeal, "attack the decree with a view of either enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below"). Accordingly, because the issues Petitioner raises now with respect to the validity of the DRP under the state constitution and Civil Rights Act of 1991 are not legitimately before this Court, they cannot provide the basis for granting the instant petition.

Even if Petitioner had properly raised either of the above issues in the court below, they would have failed on the merits. North Carolina's courts have already expressly ruled that there is no constitutional impediment to arbitration agreements. *Miller v. Two State Construction Company, Inc.*, 118 N.C. App. 412, 416-17, 455 S.E.2d. 678, 681 (1995) (relying on its reasoning in *Bentley v. N.C. Insurance Guaranty Ass'n*, 107 N.C. App. 1, 418 S.E.2d 705 (1992)). Similarly, with respect to Petitioner's argument regarding the arbitrability of statutory discrimination claims, this Court has already held that judicial protection extends to predispute agreements to arbitrate such claims. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991). *See also Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (involving Title VII claim); *Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 376 (4th Cir. 1998) (involving 42 U.S.C. § 1981 claim). Therefore, for this reason as well, Petitioner's claims premised on the 1991 Civil Rights Act and

North Carolina's constitution are baseless and cannot be relied upon to support the instant petition.

II. THE COURT OF APPEALS CORRECTLY FOUND THAT A VALID ARBITRATION AGREEMENT SUPPORTED BY CONSIDERATION EXISTED BETWEEN PETITIONER AND RESPONDENT.

In Part II of her petition, Petitioner also claims that the Court of Appeals' decision is inconsistent with Sections 1, 2 and 4 of the FAA, as well as Section 22B-10 of the North Carolina General Statutes. 9 U.S.C. §§ 1, 2, 4; N.C.G.S. § 22B-10; Pet., pp. 5-7. Like the issues discussed in Point I, *supra*, Petitioner did not raise these issues in the court below, nor were they addressed there. Pet., pp. A1a-A14a. Accordingly, they are not properly before this Court. *Morley Construction Co.*, 300 U.S. at 191, 57 S. Ct. at 325; *see also Gilmer*, 500 U.S. at 25, n.2, 111 S. Ct. at 1651, n. 2.

In any event, even if Petitioner had properly raised these claims below, they would have been immediately dismissed as inconsistent with established U. S. Supreme Court decisional law and North Carolina contract law. In reaching its decision below, the Court of Appeals properly looked to state common law contract analysis to determine whether there was a valid underlying agreement between Petitioner and Respondent to arbitrate their disputes. Pet., p. A6a. In concluding that such an agreement existed, the court relied on the record evidence showing that both parties were bound by the agreement to find that these mutual promises to abide by the provisions of the DRP and to relinquish the right to pursue certain disputes in court were sufficient consideration to support the DRP agreement under North Carolina contract law. Pet., p. A9a.

The Court of Appeals, in its ruling, rejected Petitioner's alternative argument that, even if there had been sufficient

consideration, there was no mutual *agreement* to be bound by the terms of the DRP. Pet., p. A9a. The court stated that, because the record demonstrated that Petitioner continued in Respondent's employment with actual notice that the terms of the DRP would be mutually effective, Petitioner knew that the terms of the DRP would apply to her and therefore assented to the program. Pet., pp. A10a-A11a.

While Petitioner now argues that the lower court erred in its ruling because Respondent's DRP conflicts with "well-settled principles of contract law," she does not bother to cite to any North Carolina decisional law to support her contention. Pet., p. 6. Rather, Petitioner merely refers to a portion of the language of Section 22B-10 of the North Carolina General Statutes without any explanation of how that language is relevant to her argument. To the extent, however, that Petitioner relies on Section 22B-10 in an attempt to argue that the DRP's arbitration provision is unconscionable and, therefore, unenforceable, such an argument is without merit.

Section 22B-10 provides that

> Any provision in a contract requiring a party to the contract to waive his right to a jury trial is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other forms of alternative dispute resolution.
>
> *N.C.G.S. § 22B-10.*

In interpreting that language, North Carolina courts have expressly held that an agreement to arbitrate is not an unenforceable contract requiring waiver of a jury trial. *Miller*, 118 N.C. App. at 416, 455 S.E.2d at 681.

Petitioner's argument with respect to federal arbitration

law suffers from a similar fatal flaw. As Petitioner correctly points out in her petition, this Court has already held that mere inequality in bargaining power is not a sufficient reason to find that an arbitration agreement in the employment context is unenforceable under Sections 2 and 4 of the FAA. *Gilmer*, 500 U.S. at 33, 111 S. Ct. at 1655; 9 U.S.C. § 2. Grounds for revocation of an arbitration agreement under the FAA may exist only where there are well-supported claims that the agreement resulted from fraud or overwhelming economic power. *Id.* at 25, 111 S. Ct. at 1656.

Here, the lower court found that Petitioner continued working for Respondent with actual notice that the terms of the DRP would apply to her should she remain in Respondent's employ. Pet., pp. A10a-A11a. In fact, as the lower court found, the record showed that Petitioner acknowledged to a government agency that she knew of the DRP and that she had actually utilized its procedures to her advantage prior to her termination. Pet., p. A11a. Such findings do not indicate that Petitioner was either coerced or defrauded into agreeing to the DRP, as is required to set aside an arbitration agreement under the FAA. *Gilmer*, 500 U.S. at 25-26, 111 S. Ct. at 1656. Thus, for these reasons, as well as those discussed above, Petitioner's claim that her petition should be granted because the DRP is unenforceable must be dismissed as groundless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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